

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREGORY FRANKLIN,)	No. C 03-0884 CW (PR)
)	
Plaintiff,)	ORDER GRANTING DEFENDANTS'
)	MOTION FOR SUMMARY JUDGMENT AS
v.)	TO ALL CLAIMS
)	
A. LAMARQUE, ET AL.,)	(Docket no. 98)
)	
Defendants.)	

INTRODUCTION

Plaintiff Gregory Franklin, a state prisoner currently incarcerated at California State Prison - Calipatria (Calipatria), brought this pro se civil rights complaint pursuant to 42 U.S.C. § 1983 alleging constitutional rights violations that occurred when he was incarcerated at Salinas Valley State Prison (SVSP).

Defendants move for summary judgment on all claims on the grounds that: (1) the undisputed evidence shows that they have not violated Plaintiff's constitutional rights and (2) qualified immunity protects them from liability for the acts alleged in the complaint (docket no. 67). Defendants also allege that Plaintiff's claims arising prior to February 28, 2001 are barred by the statute of limitations.

For the reasons discussed below, Defendants' motion for summary judgment is GRANTED as to all claims.

BACKGROUND

I. Procedural Background

On February 28, 2003, Plaintiff filed a complaint alleging unconstitutional conditions of confinement at SVSP from August, 1998 through January 27, 2003, the date he signed his complaint

(docket no. 1).

On February 2, 2004, Plaintiff filed an amended complaint (docket no. 9), which the Court reviewed in conjunction with the claims raised in the original complaint.

In an Order dated September 22, 2004, the Court found that Plaintiff had presented three constitutionally cognizable claims for damages, based on the denial of adequate medical care, the denial of adequate fresh air and recreation, and the denial of due process at his disciplinary proceeding, against Defendants Cal Terhune, former Director of the California Department of Corrections (CDC); Edward Alameida, former Director of the CDC; SVSP Warden A. Lamarque; SVSP Captain Antonio Hedgpeth; Lieutenant Ponder; SVSP Physician Morris Hollie, M.D.; SVSP Chief Physician Moss D. Posner, M.D.; and SVSP Dentist Richard Jones, D.M.D. (docket no. 14). The Court dismissed all other claims.

On May 11, 2006, all Defendants filed a motion for summary judgment (docket no. 98). On May 2, 2007, Plaintiff filed an opposition to Defendants' motion for summary judgment (docket no. 103). On June 15, 2007, Defendants filed a reply to Plaintiff's opposition (docket no. 109).

II. Factual Background

Plaintiff was incarcerated at SVSP from August 20, 1998 until December 18, 2003. (Papan Decl., Ex. B.)

Plaintiff claims that in September, 1998, one month after he was received at SVSP, he began complaining about his chronic foot condition. (Compl. at 5.) Plaintiff alleges that Defendants Hollie and Posner failed to provide him with adequate medical

1 attention for his condition by denying his administrative appeals,
2 by refusing to approve his foot surgery and by failing to grant his
3 request for a soft shoe chrono, which would allow him to use his
4 own personal tennis shoes at all SVSP activities.

5 He also alleges that Defendant Jones was deliberately
6 indifferent to his serious medical needs by failing to provide him
7 with a soft food diet after his teeth were extracted.

8 Plaintiff further alleges that Defendants Alameida, Lamarque,
9 Hedgpeth, and Terhune denied him constitutionally adequate access
10 to fresh air and recreation for various periods of time due to
11 unjustified and ongoing prison lockdowns occurring throughout his
12 incarceration at SVSP from August, 1998 to December, 2003. He
13 claims that he and other inmates in Facility C were held for
14 twenty-four hours a day in their cells during these lockdowns.

15 Finally, Plaintiff claims that his due process rights were
16 violated. On March 16, 2001, Plaintiff received a serious rules
17 violation for his alleged participation in a March, 2001 riot.
18 Plaintiff alleges Defendant Ponder, the hearing officer at the
19 disciplinary proceeding, failed to meet the requirements of finding
20 "some evidence" bearing "some indicia of reliability" before
21 determining that Plaintiff was guilty.

22 LEGAL STANDARD

23 Summary judgment is properly granted when no genuine and
24 disputed issues of material fact remain and when, viewing the
25 evidence most favorably to the non-moving party, the movant is
26 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
27 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);

1 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
2 1987).

3 The moving party bears the burden of showing that there is no
4 material factual dispute. Therefore, the Court must regard as true
5 the opposing party's evidence, if supported by affidavits or other
6 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
7 F.2d at 1289. The Court must draw all reasonable inferences in
8 favor of the party against whom summary judgment is sought.

9 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
10 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
11 1551, 1558 (9th Cir. 1991). A verified complaint may be used as an
12 opposing affidavit under Rule 56, as long as it is based on
13 personal knowledge and sets forth specific facts admissible in
14 evidence. Schroeder v. McDonald, 55 F.3d 454, 460 & nn.10-11 (9th
15 Cir. 1995).

16 Material facts which would preclude entry of summary judgment
17 are those which, under applicable substantive law, may affect the
18 outcome of the case. The substantive law will identify which facts
19 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
20 (1986). Where the moving party does not bear the burden of proof
21 on an issue at trial, the moving party may discharge its burden of
22 showing that no genuine issue of material fact remains by
23 demonstrating that "there is an absence of evidence to support the
24 nonmoving party's case." Celotex, 477 U.S. at 325. The burden
25 then shifts to the opposing party to produce "specific evidence,
26 through affidavits or admissible discovery material, to show that
27 the dispute exists." Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409

1 (9th Cir. 1991), cert. denied, 502 U.S. 994 (1991). A complete
2 failure of proof concerning an essential element of the non-moving
3 party's case necessarily renders all other facts immaterial.
4 Celotex, 477 U.S. at 323.

5 DISCUSSION

6 I. Denial of Adequate Medical Care Claims

7 A. Foot Care

8 1. Factual Background

9 The following facts are undisputed unless otherwise noted.

10 Plaintiff claims he has been suffering from painful calluses
11 on his feet since childhood. (Pl.'s Opp'n, Ex. 58.) He states
12 that his foot problems have been documented by the CDC since July,
13 1997. (Id., Ex. 57.)

14 On May 1, 1998, Plaintiff was seen by Dr. Shook, a podiatrist
15 at Calipatria. Plaintiff claims Dr. Shook recommended foot
16 surgery¹ and gave him permission to wear tennis shoes to all prison
17 activities in Calipatria for a year. Plaintiff was then
18 transferred to SVSP on August 20, 1998. (Id., Ex. 59.)

19 Plaintiff claims he was seen on October 27, 1998, by an SVSP
20 podiatrist, who noted the calluses on his feet but did not
21 recommend surgery. (Pl.'s Opp'n at 50.)

22 Defendants Hollie and Posner had very limited direct
23 involvement in Plaintiff's medical care. On February 27, 2002,

24
25 ¹ Defendants claim Dr. Shook's May 1, 1998 progress notes do
26 not include a recommendation for foot surgery. (Mot. for Summ. J.
27 at 17.) The Court has reviewed Dr. Shook's progress notes; his
handwriting is undecipherable. Therefore, the Court will take the
facts in the light most favorable to Plaintiff, who claims that Dr.
Shook recommended foot surgery on May 1, 1998.

1 Plaintiff was seen by Defendant Hollie, who is a physician and not
2 a podiatrist, because Plaintiff claimed to have suffered a twisted
3 ankle.² (Pl.'s Opp'n, Ex. 65.)

4 On July 17, 2002, Plaintiff filed an inmate appeal requesting
5 immediate medical attention for his foot condition and a soft shoe
6 chrono. (Id., Ex. 66.)

7 On July 24, 2002, Plaintiff's appeal was denied at the
8 informal level by Defendant Hollie, who stated: "Denied. CDC
9 issues soft shoes that can be worn anywhere except to visiting and
10 to work. Therefore there is no need for a chrono." (Id.) The
11 first formal level of appeal was bypassed. (Id.)

12 On September 19, 2002, Plaintiff's appeal was denied at the
13 second level by Defendant Posner, Chief SVSP Physician, who stated:

14 You were seen by the podiatrist on 2/22/99. He
15 prescribed and provided insoles secondary to calluses on
16 both feet. He also prescribed topical treatment for a
period of 14 days. No other treatment was clinically
indicated.

17 X-rays of both feet done on 2/9/00 at this institution
18 revealed that 'there is no evidence of any acute trauma.
The visualized bone and joint structures are normally

19
20 ² In his complaint, Plaintiff claims that when Defendant
21 Hollie examined him, he asked to see a podiatrist and inquired
22 about receiving a soft shoe chrono. (Compl. at 8.) However,
23 Plaintiff does not indicate that Defendant Hollie denied his
24 requests. Instead, Plaintiff merely states that Defendant Hollie
25 failed to "document" his request. (Id.; Pl.'s Opp'n at 52.) Nor
26 do Plaintiff's amended complaint or opposition allege that
27 Defendant Hollie denied his requests. According to the Director's
28 Level Appeal Decision related to Plaintiff's 602 appeal involving
his foot problems: "The appellant claims in March 2002 Dr. Hollie
inappropriately denied his request for a new CDC 128C authorizing
him to have and wear soft shoes." (Compl. Ex. 43 ½.) However,
because Plaintiff does not make this claim in this litigation, the
Court will not consider Plaintiff's request for surgery and a soft
shoe chrono as a basis for a claim against Defendant Hollie. The
Court will only consider the facts surrounding Defendant Hollie's
denial of the 602 appeal as part of Plaintiff's claim of a denial
of adequate medical care for his chronic foot problem.

1 developed, with no evidence of abnormality. The soft
2 tissues are unremarkable.' In other words, there is
3 nothing wrong with your feet.

4 You were seen again by the podiatrist on 1/10/00, 2/7/00
5 and 5/15/00 who found that an injury to you [sic] ankle
6 while playing sports was resolved and no further
7 podiatry care was required. . . .

8 When interviewed you requested arch supports, soft-soled
9 boots and you indicated that surgery was recommended in
10 1997. The x-rays of your feet do not suggest a need for
11 surgery, prescription footwear or any other medical
12 intervention. Your position that you need soft-shoes is
13 not supported by findings on physical examination or by
14 objective data. Prescription footwear is not clinically
15 indicated or medically necessary.

16 (Id.) Further, he noted that SVSP medical officials "had no record
17 of prior appeals being submitted through either Inmate Appeals
18 Office or through medical services within the past two years
19 regarding this issue." (Id.) Plaintiff appealed Defendant
20 Posner's response.

21 Plaintiff's appeal was denied at the Director's Level of
22 Review on November 13, 2002. (Id.)

23 On December 18, 2003, Plaintiff was transferred to Calipatria.
24 (Papan Decl., Ex. B.) Plaintiff received a soft shoe chrono from
25 2004 through 2007 (Pl.'s Opp'n, Ex. 70-71), and he was approved for
26 foot surgery in January, 2007 (id., Ex. 72).

27 In February, 2007, Plaintiff received surgery on his left
28 foot. (Id., Ex. 70-72.)

23 2. Analysis

24 Plaintiff claims that Defendants Hollie and Posner were
25 deliberately indifferent to his serious medical needs by not
26 providing him with adequate medical care for his foot problems
27 during his incarceration at SVSP from August 20, 1998 to December
28 18, 2003.

1 Deliberate indifference to serious medical needs violates the
2 Eighth Amendment's proscription against cruel and unusual
3 punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976);
4 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled
5 on other grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133,
6 1136 (9th Cir. 1997)(en banc). A determination of "deliberate
7 indifference" involves an examination of two elements: the
8 seriousness of the prisoner's medical need and the nature of the
9 defendant's response to that need. See McGuckin, 974 F.2d at 1059.

10 A serious medical need exists if the failure to treat a
11 prisoner's condition could result in further significant injury or
12 the "unnecessary and wanton infliction of pain." Id. (citing
13 Estelle, 429 U.S. at 104). The existence of an injury that a
14 reasonable doctor or patient would find important and worthy of
15 comment or treatment; the presence of a medical condition that
16 significantly affects an individual's daily activities; or the
17 existence of chronic and substantial pain are examples of
18 indications that a prisoner has a serious need for medical
19 treatment. Id. at 1059-60 (citing Wood v. Housewright, 900 F.2d
20 1332, 1337-41 (9th Cir. 1990)).

21 A prison official is deliberately indifferent if he or she
22 knows that a prisoner faces a substantial risk of serious harm and
23 disregards that risk by failing to take reasonable steps to abate
24 it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). In order to
25 establish deliberate indifference, a plaintiff must show a
26 purposeful act or failure to act on the part of the defendant and a
27 resulting harm. See McGuckin, 974 F.2d at 1060; Shapley v. Nevada
28 Bd. of State Prison Commissioners, 766 F.2d 404, 407 (9th Cir.

1 1985). Such indifference may appear when prison officials deny,
2 delay, or intentionally interfere with medical treatment, or it may
3 be shown in the way in which prison officials provided medical
4 care. See McGuckin, 974 F.2d at 1062.

5 Taking the facts in the light most favorable to Plaintiff and
6 considering the length of time that he alleges to have suffered
7 from his foot problems along with his claim that the Calipatria
8 physician recommended surgery, the Court finds that he has
9 presented a triable issue of fact as to whether his foot problems
10 involve a "chronic and substantial pain" sufficient to meet the
11 serious medical needs prong of a deliberate indifference claim.
12 McGuckin, 974 F.2d at 1060 (chronic and substantial pain is an
13 indication of a serious need for medical treatment).

14 Plaintiff alleges that Defendants Hollie and Posner acted with
15 deliberate indifference to his serious medical needs because they
16 denied his administrative appeals and did not grant his requests
17 for surgery and a soft shoe chrono for his foot problems.

18 Defendants Hollie and Posner denied Plaintiff's appeal because
19 an x-ray conducted by an SVSP physician on February 9, 2000
20 revealed no need for surgery, prescription footwear, or any other
21 medical intervention. Plaintiff's disagreement with Defendants
22 Hollie and Posner's findings is insufficient, as a matter of law,
23 to establish deliberate indifference. See Franklin v. Oregon, 662
24 F.2d 1337, 1344 (9th Cir. 1981) ("A difference of opinion between a
25 prisoner-patient and prison medical authorities regarding treatment
26 does not give rise to a § 1983 claim.").

27 Nor does a difference of opinion between doctors at different
28 prisons mean that Defendants Hollie and Posner, who are not

1 podiatrists, were not justified in relying on the podiatrist at
2 SVSP. See id.

3 Plaintiff has failed to carry his burden of raising a genuine
4 issue of fact to support his claim that Defendants Hollie's and
5 Posner's actions rose to the level of deliberate indifference to
6 his serious medical needs. Accordingly, summary judgment is
7 granted as to all claims against Defendants Hollie and Posner.

8 B. Medical Diet Claim

9 1. Factual Background

10 The following facts are undisputed unless otherwise noted.

11 In September, 1998, Defendant Jones first examined Plaintiff.
12 (Jones Decl. ¶ 3, Ex. A.) Plaintiff complained of a toothache and
13 swollen gums. He claimed that his teeth needed to be replaced
14 immediately. Defendant Jones determined Plaintiff had advanced
15 periodontitis, bone loss and an abscess. Defendant Jones performed
16 an x-ray on Plaintiff's mouth and confirmed that Plaintiff needed
17 to have his teeth extracted. However, Plaintiff refused to have
18 his teeth extracted. (Id. ¶ 3, Ex. A.)

19 On October 26, 1999, Plaintiff returned to see Defendant Jones
20 and "complained that he wanted some teeth to 'chew with,' and his
21 tooth fell out a couple of days ago." (Id. ¶ 4, Ex. A.) Defendant
22 Jones noted that Plaintiff had advanced periodontitis and
23 gingivitis, and he recommended that Plaintiff begin the process to
24 get full dentures. (Id. ¶ 3, Ex. A.) However, Plaintiff informed
25 Defendant Jones that he wanted only partial dentures, which were
26 unavailable at that time. (Id., ¶ 4, Ex. A.) Plaintiff informed
27 Defendant Jones that he would wait until the partial dentures were
28 available. (Id.) Plaintiff alleges Defendant Jones promised him a

1 soft food diet until he was able to receive his dentures, but
2 Defendant Jones did not provide the diet. (Pl.'s Opp'n at 90-91.)

3 On January 13, 2000, Defendant Jones again informed Plaintiff
4 that his remaining teeth should be extracted and replaced with a
5 complete set of dentures after his mouth had time to heal. (Id.
6 ¶ 5, Ex. A.) Defendant Jones noted that due to Plaintiff's
7 advanced periodontitis, the limited bone support for his teeth
8 would not fit to anchor or support partial dentures. (Id. ¶ 5, Ex.
9 A.) Defendant Jones states that he told Plaintiff that, if the
10 full extraction were to occur, he would be placed on a liquid diet
11 during the healing phase and while waiting for delivery of the
12 dentures. (Id. ¶ 5, Ex. A.)

13 Plaintiff claims that Defendant Jones refused to give him a
14 soft food diet if he would not undergo a full tooth extraction.
15 (Pl.'s Opp'n. at 57). Defendant Jones claims that he believed
16 Plaintiff did not need a special diet at the time Plaintiff
17 requested partial dentures. (Jones Decl. ¶ 4, Ex. A.)

18 On March 28, 2000, Plaintiff's remaining teeth were extracted.
19 (Id. ¶ 8, Ex. B.) Plaintiff was placed on a liquid diet of three
20 cans daily of Resource, a nutritional supplement, for sixty days.
21 (Id. ¶ 8, Ex. B.) However, Plaintiff alleges that he was promised
22 a soft food diet by Defendant Jones from the date of his full tooth
23 extraction until he received his dentures, and that he was not
24 provided with such a diet. (Pl.'s Opp'n at 90-91.)

25 Also on March 28, 2000, Defendant Jones requested a
26 consultation from an SVSP dietician regarding Plaintiff's
27 nutritional supplements. The dietician recommended that Defendant
28 Jones should not renew Plaintiff's liquid diet once it expired on

1 May 27, 2000. (Jones Decl., Ex. B)

2 On April 4, 2000, Defendant Jones instructed Plaintiff to
3 supplement his liquid diet with a selection of soft foods at the
4 prison cafeteria during meal times. (Id. ¶ 8, Ex. B.)

5 On April 28, 2000, Plaintiff claimed that he could not get
6 enough soft food in the dining hall. (Id. ¶ 10, Ex. A.) Defendant
7 Jones advised Plaintiff that he should see the SVSP dietician for
8 nutritional counseling. (Id.)

9 On May 11, 2000, Plaintiff was seen by an SVSP dietician who
10 offered Plaintiff a written list of forty-seven SVSP menu items
11 which could be gummed in their cooked form. The menu items listed
12 appear cyclically on the SVSP menu. (Jones Decl., Ex. B.)
13 According to the SVSP dietician, Plaintiff reviewed the list and
14 stated only that he "can't eat the vegetables." (Id. ¶ 11, Ex. B.)
15 Vegetables comprised less than two percent of the items listed.
16 (Id. ¶ 11, Ex. B.) Further, the dietician noted that Plaintiff
17 appeared to be adequately nourished and that he was 112% of his
18 ideal body weight. (Id. ¶ 11, Ex. B.)

19 On May 27, 2000, Plaintiff's liquid diet was terminated. (Id.
20 Ex. B.)

21 On November 3, 2000, Plaintiff was given his new dentures. He
22 concedes that the fix, appearance and color of his new dentures
23 were acceptable. (Id. ¶ 15, Ex. A.)

24 On November 14, 2000, Plaintiff returned to Defendant Jones
25 complaining of pain as a result of his dentures. Plaintiff was
26 treated and told to return to the clinic if any future problems
27 arose. (Id. ¶ 16, Ex. A.)

28 Plaintiff did not seek any additional dental care until

1 January, 2004, when two teeth had fallen out of his dentures. He
2 was informed that the dentures would have to be sent to the lab for
3 repair and the estimated time of repair was one month. He claims
4 that he did not want to wait for the repairs. (Id. ¶ 17, Ex. A.)

5 In October, 1998, Plaintiff weighed 187 pounds. (Id. ¶ 3, Ex.
6 B.) He gained seven pounds and weighed 194 pounds after one year.
7 (Id. ¶ 4, Ex. A.) On March 28, 2000, the date of his tooth
8 extraction, he weighed 195 pounds. (Id. ¶ 8, Ex. A.) After a
9 month, he lost four pounds. (Id. ¶ 10, Ex. A.) He then lost seven
10 more pounds and weighed 184 pounds on November 3, 2000, the date he
11 was given his new dentures. (Id. ¶ 15, Ex. A.) Therefore, the
12 record shows that Plaintiff lost a total of eleven pounds from the
13 date his teeth were extracted to the date he was given his new
14 dentures.

15 2. Analysis

16 Plaintiff alleges that Defendant Jones violated the Eighth
17 Amendment by denying him an adequate medical soft food diet after
18 his tooth extraction, thereby causing him to suffer injury because
19 he lost approximately twenty pounds.³ Plaintiff alleges that from
20 May 27, 2000, the date the liquid diet expired, through November,
21 3, 2000, the date he received his dentures, he suffered various
22 ailments related to the denial of a soft food diet.

23 Defendants do not dispute that Plaintiff was suffering from a
24 serious dental condition; the record indicates that Defendant Jones
25 diagnosed Plaintiff with advanced periodontitis, bone loss and an

26
27 ³ Plaintiff does not attach any medical documentation in
28 support of his allegation that he lost "approximately twenty
pounds." As mentioned above, the record shows that he lost eleven
pounds altogether.

1 abscess, that he extracted all of Plaintiff's teeth, and that he
2 was placed on a liquid diet for sixty days. Plaintiff's dental
3 problem may be characterized as a "chronic and substantial pain"
4 sufficient to meet the serious medical needs prong of a deliberate
5 indifference claim. See Hunt v. Dental Dep't, 865 F.2d 198, 2000
6 (9th Cir. 1989)(where the Ninth Circuit recognized dental care as
7 an important medical need of inmates). However, to establish an
8 Eighth Amendment violation Plaintiff must also provide evidence
9 that Defendant Jones was deliberately indifferent to Plaintiff's
10 serious medical needs or, specifically, his dietary needs.

11 Plaintiff claims that the sixty-day liquid diet he was given
12 after the extraction, and the soft foods available to him in the
13 cafeteria were insufficient to maintain his body weight until he
14 received his dentures eight months later.

15 Defendant Jones contends that there is no evidence that he was
16 deliberately indifferent to Plaintiff's dietary needs and therefore
17 no Eighth Amendment violation occurred. The Court agrees. The
18 record shows that Defendant Jones prescribed a liquid diet for
19 Plaintiff during the sixty-day period after his teeth were
20 extracted on March 28, 2000. Plaintiff received three Resource
21 cans each day for sixty days. During that time and thereafter,
22 soft food was available to him. He did not lose a substantial
23 amount of weight or fall below his ideal weight. There is no
24 evidence that his other health complaints were due to insufficient
25 nutrition. Plaintiff has not presented evidence that the sixty-day
26 liquid diet or the subsequent list of soft food items he was
27 provided was medically unacceptable under the circumstances. Cf.
28 Lopez v. Smith, 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc)

1 (summary judgment should not have been granted to defendants where
2 plaintiff presented evidence that prison officials failed and
3 refused to follow doctor's orders for a liquid diet for plaintiff
4 whose mouth had been wired shut to treat a broken jaw). Thus,
5 Plaintiff has failed to provide evidence regarding an essential
6 element of this claim, and Defendant Jones is entitled to summary
7 judgment as a matter of law. See Celotex, 477 U.S. at 323.

8 Accordingly, the Court GRANTS Defendant Jones's motion for
9 summary judgment as to this claim.

10 II. Denial of Fresh Air and Recreation

11 A. Factual Background

12 In September, 1998, approximately one month after Plaintiff's
13 arrival at SVSP, the classification committee completed his initial
14 review and housed him at Facility C, Yard 1, a general population
15 housing unit. (Am. Compl. at 37.)

16 A Facility C inmate receives five to six hours of yard
17 activity per day, including religious services, work, educational
18 programs, meals, medical services, canteen trips, showers, access
19 to the law library, inmate visits on designated visiting days, and
20 telephone access. (Muniz Decl., Ex. C, SVSP Operational Procedure
21 (O.P.) 11A.)

22 During a lockdown, all programs, inmate movement, and
23 activities are suspended pending an investigation of a specific
24 situation or incident. (Muniz Decl. ¶ 10, Ex. B.) During the
25 implementation of a modified program, a specific group of inmates
26 in a portion of the facility are affected by a suspension of
27 programs or services. The designated inmates are not released
28 except as determined by the facility administration on an

1 individual, case-by-case basis. (Muniz Decl. ¶ 6.) Uninvolved
2 inmates are allowed to attend work assignments unescorted and do
3 not have their privileges restricted. (Muniz Decl., Ex. B.)
4 Between 1996 and 2002, Operational Procedure No. 23 (O.P. 23) was
5 used to handle these situations. (Id.) Under O.P. 23, prison
6 officials had the option of implementing a total or partial
7 lockdown, a modified program, a suspended program, restricted
8 movement, or a state of emergency. (Id.) This condition would be
9 in effect until the facility administration personnel conducted an
10 investigation to determine that it was safe for both inmates and
11 staff to return to a normal program. (Id., Exs. A & B.)

12 On September 14, 1998, a fight between black and white inmates
13 occurred on Facility C, Yard No. 1. (Plaintiff is African-
14 American.) A modified program was implemented. (Id., Ex. A at MSJ
15 002.) On September 19, 1998, Hispanic inmates were involved in a
16 stabbing on Facility C, Yard No. 1. (Id., Ex. A at MSJ 008.) As a
17 result, SVSP officials recommended that the black and white inmate
18 population remain on their current modified program. (Id., Ex. A
19 at MSJ 008.)

20 On October 7, 1998, black and white inmates were involved in a
21 fight with the use of weapons in Facility C, Yard No. 1, resulting
22 in the firing of weapons, including a "Mini 14 and [a] 37 mm."
23 (Id., Ex. A at MSJ 010.) As a result of the stabbing involving
24 Hispanic inmates and the multiple fights involving black and white
25 inmates, Facility C, Yard No. 1 remained on a modified program.
26 (Id., Ex. A at MSJ 008.)

27 On January 19, 1999, Hispanic inmates were involved in another
28 stabbing assault on Facility C, Yard No. 1. (Id., Ex. A at MSJ

1 018.) As a result of the incident, Facility C inmates remained on
2 a modified program pending further investigation. (Id., Ex. A at
3 MSJ 018.) On February 6 and 26, 1999, a substantial amount of
4 metal was cut out of a cake pan. In addition, weapon stock was
5 discovered to be missing from Facility C's kitchen and education
6 program. As a result, all inmate activities were suspended and
7 inmates on Facility C, Yards No. 1 and 2 remained on a modified
8 program. (Id., Ex. A at MSJ 023.)

9 On March 26, 1999, Facility C's status changed to a "partial"
10 lockdown. As a result, black and white inmates were permitted to
11 use the yard on a rotating basis. (Id., Ex. A at MSJ 025.)

12 On March 28, 1999, a Southern Hispanic inmate on Facility C,
13 Yard No. 1, was stabbed and sustained serious injuries. As a
14 result, all inmates were placed on lockdown pending investigation
15 of the incident. (Id., Ex. A at MSJ 026.)

16 On April 10, 1999, Facility C, Yard No. 1 inmates were placed
17 on a "partial" lockdown and allowed to use the yard on a rotating
18 basis. (Id., Ex. A at MSJ 028.)

19 On April 29, 1999, Facility C, Yard No. 1 returned to normal
20 programming for all inmates. (Id., Ex. A at MSJ 043.)

21 On May 4, 1999, a Hispanic inmate was stabbed in Facility C,
22 Yard No. 1. As a result, Facility C, Yard No. 1, Section A was
23 placed on lockdown. (Id., Ex. A at MSJ 044.) On May 10, 1999, all
24 inmates were released to normal programming. (Id., Ex. A at MSJ
25 047.)

26 On May 11, 1999, two pieces of thirteen inch lever handles
27 were discovered missing from the computer lab in Facility C. As a
28 result, Facility C was placed on lockdown pending investigation.

1 (Id., Ex. A at MSJ 048.)

2 On July 22, 1999, three correctional officers were stabbed by
3 an inmate during a cell extraction in Facility C. The entire
4 population of Facility C remained on lockdown status. A state of
5 emergency was declared for Facility C. (Id., Ex. A at MSJ 056.)

6 On September 8, 1999, Facility C began to release a limited
7 number of inmates to the yard. (Id., Ex. A at MSJ 096.) Facility
8 C did not return to normal programming until September 24, 1999.
9 (Id., Ex. A at MSJ 114.)

10 Between September 24, 1999 and September 29, 1999, three
11 stabbings occurred in Facility C, Yard No. 2. (Id., Ex. A at MSJ
12 125.) Facility C was again placed on lockdown and a state of
13 emergency was declared. (Id., Ex. A at MSJ 125.) On October 2,
14 1999, multiple black inmates were involved in a stabbing on
15 Facility C, Yard No. 1, resulting in an assault on staff and
16 inmates. (Id., Ex. A at MSJ 127.) As a result of the numerous
17 stabbings, Facility C remained on lockdown status and a state of
18 emergency was declared. (Id., Ex. A at MSJ 127.)

19 On December 16, 1999, the facility was returned to normal
20 programming. (Id., Ex. A at MSJ 228.)

21 On January 15, 2000, a stabbing occurred involving white
22 inmates on Facility C, Yard No. 1. (Id., Ex. A at MSJ 238.)

23 On January 17, 2000, a Northern Hispanic inmate was stabbed on
24 Facility C, Yard No. 1. (Id., Ex. A at MSJ 238.) Due to the
25 ongoing pattern of violence using inmate-manufactured weapons,
26 programming was suspended pending a search of all common areas.
27 (Id., Ex. A at MSJ 238.) On February 24, 2000, the search was
28 completed and programming was returned to normal. (Id., Ex. A at

MSJ 255.)

On March 24, 2000, a violent fight occurred between Crips and Bloods gang members at SVSP, resulting in all black inmates being placed on a modified program pending further investigation. (Id., Ex. A at MSJ 257.) On April 7, 2000, a black inmate was stabbed in Yard No. 2; therefore, Yards No. 1 and No. 2 remained on a modified program. (Id., Ex. A at MSJ 266.) On April 11, 2000, Yard No. 1 was returned to normal programming. (Id., Ex. A at MSJ 267.)

During the period from July, 2000 through December, 2000, various incidents occurred among the prisoners resulting in Facility C, Yard No. 1 being placed on modified programming. (Id., Ex. A, MSJ 272 - 299.)

On March 16, 2001, a large scale riot between North and South Hispanic inmates and black inmates resulted in an extremely modified program for prisoners which lasted until February, 2002. (Id., Ex. A at MSJ 357.) During this period, inmates were allowed out of their cells for showers and yard time, and were escorted to medical visits, normal visits, and library hours. (Id., Ex. A at MSJ 357.)

From December 1, 2002 to January 13, 2003, there were twenty-seven incidents in Facility C with a majority of the incidents involving weapons. A search led to the discovery of approximately 100 weapons. An investigation revealed that different gang factions were working in concert for illegal purposes. (Id., Ex. A at MSJ 363.) Consequently, a state of emergency was declared on January 13, 2003 which lasted until January 24, 2003. (Id., Ex. A at MSJ 363-364.)

From January, 2003 to May, 2003, Facility C was placed on a

1 modified program that permitted inmates on the yard on a rotational
2 basis. On May 20, 2003, programming was returned to normal. (Id.,
3 Ex. A at MSJ 370.)

4 On June 24, 2003, another state of emergency was implemented
5 due to a serious assault on a peace officer by the Crips gang
6 members in Facility D. (Id., Ex. A at MSJ 374.) All facilities
7 at SVSP were placed on a state of emergency pending a threat
8 assessment, and all recreation activities were suspended. (Id.)
9 On September 23, 2003, all inmates were allowed to participate in
10 recreation activities. (Id., Ex. A at MSJ 376.)

11 On November 12, 2003, all facilities at SVSP were put on
12 lockdown due to another serious assault on a peace officer. (Id.,
13 Ex. A at MSJ 377.) The lockdown remained in effect pending a
14 threat assessment, and all recreation activities were suspended.
15 (Id.) On December 16, 2003, all inmates except Northern and
16 Southern Hispanics were returned to normal programming. (Id., Ex.
17 A at MSJ 385.)

18 On December 18, 2003, Plaintiff was transferred to Calipatria.
19 (Papan Decl., Ex. B.)

20 B. Analysis

21 Plaintiff alleges that from the beginning of his incarceration
22 at SVSP in August, 1998 to the time he was transferred in December,
23 2003, he was periodically denied constitutionally adequate access
24 to fresh air and recreation due to unjustified and ongoing prison
25 lockdowns.

26 The Constitution does not mandate comfortable prisons, but
27 neither does it permit inhumane ones. See Farmer v. Brennan, 511
28 U.S. 825, 832 (1994). The treatment a prisoner receives in prison

1 and the conditions under which he is confined are subject to
2 scrutiny under the Eighth Amendment. See Helling v. McKinney, 509
3 U.S. 25, 31 (1993). In its prohibition of "cruel and unusual
4 punishment," the Eighth Amendment places restraints on prison
5 officials. See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). The
6 Eighth Amendment also imposes duties on these officials, who must
7 provide all prisoners with the basic necessities of life such as
8 food, clothing, shelter, sanitation, medical care and personal
9 safety. See Farmer, 511 U.S. at 832; DeShaney v. Winnebago County
10 Dep't of Social Servs., 489 U.S. 189, 199-200 (1989).

11 Exercise is one of the basic human necessities protected by
12 the Eighth Amendment. Wilson v. Seiter, 501 U.S. 294, 304 (1991).
13 "[T]he denial of fresh air and regular outdoor exercise and
14 recreation constitutes cruel and unusual punishment." Spain v.
15 Procunier, 600 F.2d 189, 199 (9th Cir. 1979) (citing Spain v.
16 Procunier, 408 F. Supp. 534, 547 (N.D. Cal. 1976.)) Some form of
17 regular exercise, including outdoor exercise, "is extremely
18 important to the psychological and physical well being" of
19 prisoners. See Spain v. Procunier, 600 F.2d 189, 199 (9th Cir.
20 1979). Prison officials therefore may not deprive prisoners long-
21 term of regular outdoor exercise. Id.

22 The Court construes Plaintiff's claim of a deprivation of
23 fresh air and recreation as a claim of denial of outdoor exercise.

24 Deprivation of necessities by a prison official violates the
25 Eighth Amendment when two requirements are met: (1) the
26 deprivation alleged must be, objectively, sufficiently serious, see
27 Farmer, 511 U.S. at 834 (citing Wilson, 501 U.S. at 298), and (2)
28 the prison official possesses a sufficiently culpable state of

1 mind, see id. (citing Wilson, 501 U.S. at 297). In determining
2 whether a deprivation of a basic necessity, such as outdoor
3 exercise, is sufficiently serious to satisfy the objective
4 component, a court must consider the circumstances, nature and
5 duration of the deprivation. See Spain, 600 F.2d at 199. To
6 satisfy the subjective component, the requisite state of mind
7 depends on the nature of the claim. In prison-conditions cases,
8 the necessary state of mind is one of "deliberate indifference."
9 See, e.g., Farmer, 511 U.S. at 834 (inmate safety).

10 In Spain, the Ninth Circuit held that the deprivation of
11 outdoor exercise constituted cruel and unusual punishment where the
12 inmates were confined to continuous segregation for a period of
13 over four years under harsh conditions. See generally Spain, 600
14 F.2d at 189. The plaintiffs were in continuous segregation,
15 spending virtually twenty-four hours a day in their cells. Id.
16 They had little contact with other people, lived in degrading
17 conditions, and there was an atmosphere of fear and apprehension.
18 Id. In addition, the prison provided no programs of training or
19 rehabilitation. Id.

20 In other cases, the Ninth Circuit has applied Spain's
21 guarantee of outdoor exercise under conditions involving shorter
22 periods. In Toussaint v. Yockey, the Ninth Circuit upheld a
23 preliminary injunction requiring outdoor exercise where segregation
24 lasted for over one year and the inmates had been confined to their
25 cells for close to twenty-four hours a day. 722 F.2d 1490, 1492-93
26 (9th Cir. 1984). In Keenan v. Hall, the Ninth Circuit reversed the
27 district court's grant of the prison official's motion for summary
28 judgment on an inmate's Eighth Amendment claim of a deprivation of

1 outdoor exercise for a six month period. 83 F.3d 1083, 1089-90
2 (9th Cir. 1996), amended, 135 F.3d 1318 (9th Cir. 1998). The Ninth
3 Circuit has found that a deprivation of outdoor exercise for an
4 even shorter six-week period was enough to proceed to trial on an
5 Eighth Amendment claim by inmates in indefinite segregation in
6 Allen v. Sakai, 48 F.3d 1082, 1087-88 (9th Cir. 1994) (affirming
7 district court's denial of summary judgment and finding no
8 qualified immunity in outdoor exercise claim), cert. denied, 514
9 U.S. 1065 (1995).

10 On the other hand, the denial of outdoor exercise for security
11 reasons does not violate the Eighth Amendment. See LeMaire v.
12 Maass, 12 F.3d 1444, 1458 (9th Cir. 1993). In LeMaire, the Ninth
13 Circuit reversed the district court's post-trial findings that
14 depriving the plaintiff of outdoor exercise during his nearly five
15 year confinement amounted to an Eighth Amendment violation. Id.
16 The plaintiff in LeMaire had attacked two correctional officers and
17 vowed to attack again; therefore, the court found that restricting
18 his exercise privileges to exercising only within his cell did not
19 meet the subjective requirements for an Eighth Amendment violation
20 because "prison officials are authorized and indeed required to
21 take appropriate measures to maintain prison order and discipline
22 and protect staff and other prisoners from such violent inmates."
23 Id. Similarly, in Hayward v. Procnier, the Ninth Circuit affirmed
24 the district court's denial of declaratory relief and rejection of
25 an Eighth Amendment claim where the plaintiffs were denied outdoor
26 exercise for five months following a lockdown in response to a
27 "genuine emergency." 629 F.2d 599, 603 (9th Cir. 1980), cert.
28 denied, 451 U.S. 937 (1981).

1 Defendants contend that they were not deliberately indifferent
2 to Plaintiff's need for outdoor exercise because he fails to show
3 that the lockdowns were unjustified and did not amount to genuine
4 emergencies. Defendants claim that the deprivation of outdoor
5 exercise was a result of the overriding safety and security
6 concerns which led to the lockdowns.

7 Plaintiff's case is distinguishable from Spain, in which the
8 plaintiff inmates had no "possible rewards or incentives from the
9 state which will give them a semblance of hope for their transfer,"
10 id. at 199, under the policies in place at the time of the
11 lockdowns. In Spain, the court found that the plaintiff was
12 entitled to at least one hour of exercise per day, five days a
13 week, "unless inclement weather, unusual circumstances, or
14 disciplinary needs made that impossible." 600 F.2d at 199.
15 However, the court acknowledged that an inmate's entitlement to
16 exercise may be circumscribed because of "unusual circumstances" or
17 "disciplinary needs" which makes such exercise impossible. Id.

18 Plaintiff's case is more similar to Hayward, where there was
19 no Eighth Amendment violation although the plaintiffs were deprived
20 of outdoor exercise for five months due to a genuine emergency.
21 629 F.2d at 603. The Hayward court found that a lockdown in
22 response to a genuine emergency was an example of the "unusual
23 circumstances reserved in Spain." Id. Accordingly, although
24 Defendants deprived Plaintiff of recreation and exercise for
25 various periods during his incarceration, their actions may be
26 excused due to the overriding security concerns of the prison at
27 the times in question.

28 Plaintiff claims that denying him outdoor exercise in some

1 instances was unjustified. For example, Plaintiff claims the
2 lockdown that occurred as a result of the incident on September 19,
3 1998, where Hispanic inmates were involved in a stabbing on
4 Facility C, Yard No. 1, was unjustified because the incident did
5 not involve any black prisoners. However, as noted above, case law
6 dictates that "prison officials are authorized and indeed required
7 to take appropriate measures to maintain prison order and
8 discipline and protect staff and other prisoners from such violent
9 inmates." Lemaire, 12 F.3d at 1458. Accordingly, Plaintiff's
10 complaints regarding his inclusion in lockdowns, which he deemed
11 was unjustified because of his lack of involvement in the
12 incidents, are unfounded.

13 The denial of outdoor exercise for security reasons in the
14 present case does not violate the Eighth Amendment. The record
15 shows that the lockdowns of Facility C resulted from genuine
16 emergencies. Further, these measures were temporary and the
17 restrictions were lifted as the prison officials determined that
18 the emergencies dissipated.

19 Thus, Plaintiff has not made a showing sufficient to survive
20 summary judgment on this claim. Accordingly, Defendants Alameida,
21 Terhune, Lamarque and Hedgpeth are entitled to summary judgment on
22 Plaintiff's Eighth Amendment claim stemming from the denial of
23 outdoor exercise.

24 III. Denial of Due Process at Disciplinary Proceeding

25 A. Factual Background

26 On March 16, 2001, a large scale riot broke out on Facility C
27 yard between black and Hispanic inmates. Plaintiff was charged
28 with violating Title 15 of the California Code of Regulations

§ 3005(c), which prohibits willfully inciting or participating in a riot.

Plaintiff's disciplinary hearing was on May 29, 2001. (Compl., Ex. 66.) He was found guilty of the violation and assessed a loss of ninety days of credits. (Compl., Ex. 61.)

On August 13, 2001, Plaintiff filed an inmate appeal requesting dismissal of the rules violation and restoration of his lost credits. (Id., Ex. 64.)

Plaintiff's appeal was bypassed at the informal and the first formal level of review. His appeal was denied at the second level of review. His appeal was granted at the third and final level of review and all credits were restored.⁴ (Id.)

B. Analysis

Plaintiff claims Defendant Ponder violated his due process rights by convicting him in a disciplinary proceeding based on insufficient evidence as prohibited by the Due Process Clause.

Interests protected by the Due Process Clause may arise from two sources -- the Due Process Clause itself and laws of the States. See Meachum v. Fano, 427 U.S. 215, 223-27 (1976). Changes in conditions so severe as to affect the sentence imposed in an

⁴ Title 15 of the California Code of Regulations prohibits the assessment of credit forfeiture when the inmate is not provided a written explanation of the extraordinary circumstance preventing a hearing within thirty days after the inmate was provided a copy of the rules violation report. Cal. Code. Reg. tit. 15, § 3320(f)(4). Defendants note that the reason for the restoration was that the Senior Hearing Officer (SHO) handling Plaintiff's case did not establish in the findings of the hearing that the hearing delay did not prejudice Plaintiff. The SHO did not document that the delayed hearing did not prejudice the inmate. Thus, Plaintiff's lost credits were restored. However, Plaintiff claims that he was unable to transfer to a lower level security prison because of his conviction. Therefore, the Court does not find his claim moot.

1 unexpected manner implicate the Due Process Clause itself, whether
2 or not they are authorized by state law. See Sandin v. Conner, 515
3 U.S. 472, 484 (1995). Deprivations authorized by state law that
4 are less severe or more closely related to the expected terms of
5 confinement may also amount to deprivations of a procedurally
6 protected liberty interest, provided that (1) state statutes or
7 regulations narrowly restrict the power of prison officials to
8 impose the deprivation, i.e., give the inmate a kind of right to
9 avoid it, and (2) the liberty in question is one of "real
10 substance." See id. at 477-87.

11 In addition, even where the discipline imposed is neither so
12 severe as to implicate the Due Process Clause itself, nor does it
13 implicate a state created liberty interest, it nonetheless violates
14 an inmate's right to procedural due process if it is supported by
15 "no evidence." See Burnsworth v. Gunderson, 179 F.3d 771, 773-74
16 (9th Cir. 1999) (putting escape conviction supported by no evidence
17 on prisoner's record violates procedural due process rights).

18 In Superintendent v. Hill, 472 U.S. 445, 454 (1985), the Court
19 held that the revocation of good-time credits does not comport with
20 the minimum requirements of procedural due process in Wolff v.
21 McDonnell, 418 U.S. 539 (1974), unless the findings of the prison
22 disciplinary board are supported by some evidence in the record.
23 The standard for the modicum of evidence required is met if there
24 was some evidence from which the conclusion of the administrative
25 tribunal could be deduced. See Hill, 418 U.S. at 455. An
26 examination of the entire record is not required nor is an
27 independent assessment of the credibility of witnesses or weighing
28 of the evidence. See id. The relevant question is whether there

1 is any evidence in the record that could support the conclusion
2 reached by the disciplinary board. See id. The Court reiterated
3 that revocation of good-time credits is not comparable to a
4 criminal conviction and neither the amount of evidence necessary to
5 support such a conviction, nor any other standard greater than some
6 evidence, applies in this context. See id. at 456.

7 The Ninth Circuit additionally has held that there must be
8 some indicia of reliability of the information that forms the basis
9 for prison disciplinary actions. See Cato v. Rushen, 824 F.2d 703,
10 704-05 (9th Cir. 1987) (only evidence implicating defendant placed
11 in disciplinary segregation was uncorroborated hearsay statement of
12 confidential informant who had no first hand knowledge of any
13 relevant statements or actions of defendant and whose polygraph
14 test was inconclusive).

15 Here, Plaintiff claims he was not guilty of participation in
16 the March 16, 2001 riot. However, the record shows that there was
17 some evidence on which Plaintiff was found guilty of participating
18 in this riot involving black and Hispanic inmates.

19 The record shows that Plaintiff was present at the riot.
20 Further, Plaintiff sustained a contusion to his left eyebrow during
21 the riot. (Compl., Ex. 61.) Thus, there was "some evidence" from
22 which Defendant Ponder's conclusion that Plaintiff was involved in
23 the riot could be deduced, thus satisfying the Due Process Clause.
24 The Court finds that Plaintiff fails to raise a genuine issue of
25 fact that he was denied his due process rights at his disciplinary
26 hearing.

27 Accordingly, Defendant Ponder is entitled to summary judgment
28 on the claim of denial of due process at the disciplinary hearing

1 stemming from the March 16, 2001 incident. See Celotex Corp., 477
2 U.S. at 232.

3 IV. Qualified Immunity

4 In the alternative, Defendants claim that they are entitled to
5 summary judgment on all claims based on qualified immunity.

6 The defense of qualified immunity protects "government
7 officials . . . from liability for civil damages insofar as their
8 conduct does not violate clearly established statutory or
9 constitutional rights of which a reasonable person would have
10 known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The rule
11 of qualified immunity protects "'all but the plainly incompetent or
12 those who knowingly violate the law.'" Saucier v. Katz, 533 U.S.
13 194, 202 (2001) (quoting Malley v. Briggs, 475 U.S. 335, 341
14 (1986)). Defendants may have a reasonable, but mistaken, belief
15 about the facts or about what the law requires in any given
16 situation. Id. "Therefore, regardless of whether the
17 constitutional violation occurred, the [official] should prevail if
18 the right asserted by the plaintiff was not 'clearly established'
19 or the [official] could have reasonably believed that his
20 particular conduct was lawful." Romero v. Kitsap County, 931 F.2d
21 624, 627 (9th Cir. 1991). When qualified immunity is asserted in a
22 motion for summary judgment, a district court must carefully
23 examine the specific factual allegations against each individual
24 defendant. Cunningham v. Gates, 229 F.3d 1271, 1287 (9th Cir.
25 2000).

26 To determine whether a defendant is entitled to qualified
27 immunity, the court must engage in the following inquiries. At the
28 outset, the court must determine whether the plaintiff has alleged

1 the deprivation of an actual constitutional right. Conn v.
2 Gabbert, 526 U.S. 286, 290 (1999). In other words, the court must
3 ask, "Taken in the light most favorable to the party asserting the
4 injury, do the facts alleged show the officer's conduct violated a
5 constitutional right?" Brosseau v. Haugen, 543 U.S. 194, 197
6 (2004); Saucier, 533 U.S. at 201. If this inquiry yields a
7 positive answer, then the court proceeds to determine if the right
8 was "clearly established." Id.

9 The inquiry as to whether the right at issue was clearly
10 established must be made in light of the specific context of the
11 case, not as a broad general proposition. Saucier, 533 U.S. at
12 202. "Although earlier cases involving 'fundamentally similar'
13 facts can provide especially strong support for a conclusion that
14 the law is clearly established, they are not necessary to such a
15 finding." Hope v. Pelzer, 536 U.S. 730, 741 (2002). As the
16 Supreme Court has explained, "[O]fficials can still be on notice
17 that their conduct violates established law even in novel factual
18 circumstances." Id. at 753. The plaintiff bears the burden of
19 proving the existence of a clearly established right at the time of
20 the allegedly impermissible conduct. Maraziti v. First Interstate
21 Bank, 953 F.2d 520, 523 (9th Cir. 1992).

22 If the law is determined to be clearly established, the next
23 question is whether, under that law, a reasonable official could
24 have believed his or her conduct was lawful in the situation
25 confronted. Act Up!/Portland v. Bagley, 988 F.2d 868, 871-72 (9th
26 Cir. 1993). If the law did not put the officer on notice that his
27 or her conduct would be clearly unlawful, summary judgment based on
28 qualified immunity is appropriate. Saucier, 533 U.S. at 202.

1 Therefore, qualified immunity shields an officer from suit when he
2 or she makes a decision that, even if constitutionally deficient,
3 reasonably misapprehends the law governing the circumstances she
4 confronted. Id. at 206. The defendant bears the burden of
5 establishing that his or her actions were reasonable, even though
6 he or she violated the plaintiff's constitutional rights. Doe v.
7 Petaluma City School Dist., 54 F.3d 1447, 1450 (9th Cir. 1995);
8 Neely v. Feinstein, 50 F.3d 1502, 1509 (9th Cir. 1995); Maraziti,
9 953 F.2d at 523.

10 The Court has already found that Defendants' actions did not
11 rise to the level of a constitutional violation as to any of
12 Plaintiff's claims. However, even if Plaintiff's rights had been
13 violated and his rights were clearly established at the time of the
14 violation, Defendants are entitled to qualified immunity because
15 they have produced sufficient evidence showing that they could have
16 believed that their actions were reasonable in the circumstances of
17 each claim as outlined below.

18 First, Plaintiff alleges that Defendants Hollie and Posner did
19 not provide him with adequate medical care for his foot problems
20 and that he suffered ongoing pain as a result of their deliberate
21 indifference, constituting a violation of the Eighth Amendment.
22 These Defendants' decision to deny Plaintiff's requests for a soft
23 shoe chrono and surgery was based upon numerous tests and visits
24 with SVSP health care workers. A reasonable prison official in
25 Defendants Hollie and Posner's position could have thought it was
26 unnecessary to grant Plaintiff's requests for a soft shoe chrono
27 and surgery. Therefore, Defendants Hollie and Posner are entitled
28 to judgment as a matter of law based on their qualified immunity

1 defense.

2 Second, Plaintiff alleges that Defendant Jones did not provide
3 him with a special soft food diet, causing him to suffer weight
4 loss and constituting a violation of the Eighth Amendment.
5 Defendant Jones did not prescribe a special soft food diet for
6 Plaintiff; however, reasonable alternatives were available.
7 Defendant Jones provided Plaintiff with a liquid diet for two
8 months following the extraction of his teeth. Plaintiff was also
9 provided with a list of soft foods available on the SVSP menu to
10 supplement his dietary needs. Therefore, Defendant Jones is
11 entitled to judgment as a matter of law based on his qualified
12 immunity defense.

13 Third, Plaintiff alleges that Defendants Alameida, Lamarque,
14 Hedgpeth and Terhune denied him constitutionally adequate access to
15 fresh air and recreation as a result of unjustified lockdowns,
16 constituting a violation of the Eighth Amendment. Plaintiff has
17 not shown that Defendants' behavior was unreasonable from the
18 perspective of a prison official in that situation. A reasonable
19 prison official in Defendants' position could have thought the
20 lockdowns were justified due to the number of violent incidents
21 that occurred at SVSP during Plaintiff's incarceration and the need
22 for the protection of prison officials and inmates. Therefore,
23 Defendants Alameida, Lamarque, Hedgpeth and Terhune are entitled to
24 judgment as a matter of law based on their qualified immunity
25 defense.

26 Finally, Plaintiff alleges that Defendant Ponder convicted him
27 of a rule violation based on evidence insufficient to satisfy the
28 Due Process Clause. A reasonable prison official in Defendant

1 Ponder's position could have thought that Plaintiff's presence at
2 the March, 2001 riot coupled with a contusion to his left eyebrow
3 sustained during the riot showed that there was "some evidence"
4 from which Plaintiff's involvement in the riot could be deduced,
5 thus satisfying the Due Process Clause. Therefore, Defendant
6 Ponder is entitled to judgment as a matter of law based on his
7 qualified immunity defense.

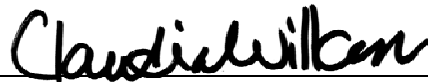
8 CONCLUSION

9 For the foregoing reasons, Defendants' motion for summary
10 judgment is GRANTED as to all claims (docket no. 98).⁵ The Clerk
11 of the Court shall enter judgment in favor of Defendants, terminate
12 all pending motions, and close the file.

13 This Order terminates Docket no. 98.

14 IT IS SO ORDERED.

15 DATED: 9/20/07



16 CLAUDIA WILKEN
17 United States District Judge
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27 ⁵ Because the Court has granted Defendants' motion for summary
28 judgment, it need not address their allegations that Plaintiff's
claims arising before February 28, 2001 are barred by the statute
of limitations.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

FRANKLIN,

Plaintiff,

v.

ALAMEIDA ET AL et al,

Defendant.

Case Number: CV03-00884 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September 20, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: September 20, 2007

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk